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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERIC ANTHONY PARKER, Petitioner - Appellant, V. JEANNE S. WOODFORD, Director, Respondent - Appellee.	No. 04-17518 D.C. No. CV-00-04064-WHA MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, Distict Judge, Presiding

Argued and Submitted October 20, 2005
San Francisco, California

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

Eric Anthony Parker appeals the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254 and argues that the district court abused its discretion by denying an evidentiary hearing on his claims. We affirm in part, reverse in part, and remand with instructions to hold an evidentiary hearing on the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

ineffective assistance of counsel claim for failure to investigate and present a potential alibi defense.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Parker's petition can be granted only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). Here, we are presented with a "post card" denial of Parker's habeas corpus petition by the California Supreme Court, so we assess "unreasonableness" by conducting an "independent review of the record." *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

Applying these standards, and considering the totality of the evidence, we hold that it was reasonable for the California courts to conclude the following:

(1) The trial court did not violate due process by relying upon the courtroom bailiff's statement suggesting that all jurors had properly deliberated as evidence that Parker had received a fair trial. *See Tracey v. Palmateer*, 341 F.3d 1037, 1044-45 (9th Cir. 2003).

(2) Parker did not demonstrate prejudice from trial counsel's failure to alert the trial court to the possibility of misconduct by Juror DeLoach. Accordingly, the

ineffective assistance claim predicated on this aspect of trial counsel's performance failed. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

(3) Parker did not demonstrate prejudice from trial counsel's failure to call Patricia Kincaid to impeach the trial testimony of Deron Kincaid. Accordingly, the ineffective assistance claim predicated on this aspect of trial counsel's performance failed. *See id.* at 687.

Finally, Parker claims that trial counsel rendered ineffective assistance by failing to investigate and present an alibi defense. The record before us does not contain sufficient evidence on which to evaluate the reasonableness of the California court's application of clearly established federal law to this claim. And, for the following reasons, we conclude that the district court erred by denying Parker's petition on this ineffective assistance of counsel claim without holding an evidentiary hearing.

First, Parker did not "fail to develop" the factual basis for his claim. Rather, he sought diligently to develop the record pursuant to California habeas procedures but was denied that opportunity by the state court, so AEDPA does not preclude an evidentiary hearing. *Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999); *see also Williams v. Taylor*, 529 U.S. 420, 432 (2000). Second, it is uncontroverted that, having summarily denied his petition, "the state trier of fact

did not afford [Parker] a full and fair fact hearing," *Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005) (quoting *Townsend v. Sain*, 372 U.S. 293, 313 (1963)). Third, Parker has stated a "colorable claim," *id.* at 670, that counsel's failure to pursue a possible alibi defense was deficient and prejudicial, *Strickland*, 466 U.S. at 687. If his allegations are true, Parker's case is governed by our decision in *Riley v. Payne*, where in similar circumstances we found that, "[e]ven under the narrow constraint of our review under AEDPA and the Supreme Court's precedent, . . . there was an unreasonable application of *Strickland*." 352 F.3d 1313, 1323 (9th Cir. 2003).

Therefore, Parker is entitled to an evidentiary hearing. *Insyxiengmay*, 403 F.3d at 670.

AFFIRMED in part, **REVERSED** in part, and **REMANDED.**